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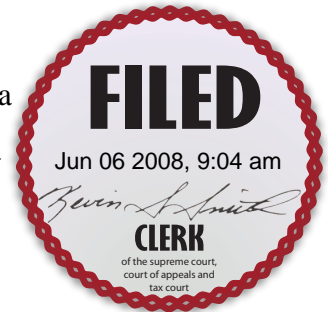
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**IN THE
COURT OF APPEALS OF INDIANA**

TONY R. GRAY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 10A01-0708-CR-356

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Donahue, Judge
Cause No. 10C01-0702-FB-82

June 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Tony R. Gray appeals his convictions for two counts of class B felony robbery and three counts of class B felony criminal confinement. We affirm.

Issues

Gray raises five issues, which we restate as follows:

- I. Whether the trial court abused its discretion in denying his motion for severance;
- II. Whether he waived his claim that the admission of his statements to police was an abuse of discretion;
- III. Whether he waived his claim that the admission of pretrial identifications of him as the robber was an abuse of discretion;
- IV. Whether there was sufficient evidence to support the jury's determination that he was armed with a gun during both robberies; and
- V. Whether his convictions for robbery and criminal confinement violate double jeopardy principles.

Facts and Procedural History

On February 14, 2007, at approximately 10:00 p.m., Gray entered the Clarksville Arby's restaurant through the front door wearing a dark toboggan hat and a black jacket. He ordered the cashier, Stacy Dodge, to get behind the counter. Gray had his hand in his right pocket, and Dodge believed he had a gun in the pocket. Gray asked Dodge if she was the manager, and she replied that she was not. Gray took her to the back of the restaurant and asked for the manager. He ordered the employees, including Dodge and Tim Crowe, to get down on the floor. He ordered the store manager, Stacey Clark, to open the safe and then to empty the three cash registers. Clark saw a black handle in Gray's right jacket pocket, which

she thought was a gun that was pointed at her. Gray told Clark to stay calm and no one would get hurt. Tr. at 419, 430, 582. Clark “was really scared for [her] life and [her] employees’ lives.” *Id.* at 419. Gray and Clark returned to the back of the restaurant, and Gray ordered the employees not to look at him. He put Clark in the walk-in freezer and left the restaurant through the side door. Gray took approximately \$1000 from Arby’s.

Four days later, on February 18, 2007, at approximately 8:00 p.m., Gray entered the Clarksville Long John Silver’s restaurant through an exit door wearing a dark toboggan hat and a black jacket. He told employee Kathleen Doss that this was a robbery and ordered her to be calm. Doss believed that Gray had a gun in his pocket. Gray did not notice a customer, Ella Henley, sitting in a booth. She observed Gray holding Doss’s arm and nudging her with his right hand in his pocket as they moved to the back of the restaurant. Henley thought Gray had a gun in his jacket pocket. She quietly exited the restaurant and called 911 from a nearby Pizza Hut.

At the back of the restaurant, general manager Thomas Jones stepped forward. He saw Gray’s right hand positioned in his jacket pocket like he was holding a gun. Gray told the employees to line up facing the wall and ordered Jones to remove all the cash from the restaurant’s safe and registers. At some point, Gray told Jones, “You act like you want to die today” and “you’re going to end up getting yourself shot.” *Id.* at 39-40, 601-02. While Gray and Jones were retrieving the cash, one of the employees in the back called the police. Gray and Jones returned to the back, and Gray ordered the employees to stay and not look at him. Gray left through a back door, taking approximately \$2600.

Clarksville police officer Carl Durbin responded to the dispatch of a robbery in progress at the Long John Silver's. As he approached the restaurant in his vehicle, he saw a man matching the suspect's description running from the back of the Long John Silver's to a nearby Firestone store. The restaurant employees pointed to the man. Officer Durbin drove to the back of the Firestone, and a Celica GT came around the corner. Officer Durbin stopped the vehicle, and Gray immediately jumped out with his hands in the air. He volunteered that there was marijuana in the car. Officer Durbin handcuffed Gray and performed a pat-down search. He found a silver Norelco electric shaver in Gray's right front jacket pocket. Jones approached and identified Gray as the robber.

Captain Dale Hennessey arrived and asked Gray where the money was. Gray told him it was in the front seat of the car. Captain Hennessey then asked Gray if he had worn a toboggan hat during the robbery, and Gray responded affirmatively. Captain Hennessey searched Gray's car for weapons and found marijuana, a toboggan hat, and the money from Long John Silver's. No gun relating to the robberies was ever found. Gray was detained in a police car. Henley was taken to that car and, while sitting in an adjacent police car, identified Gray as the man she had seen in Long John Silver's.

On February 19, 2007, Captain Dale Abell took a six-picture photo array to the Arby's and showed it to Crowe, who identified Gray as the Arby's robber. On the same day, Dodge went to the Clarksville police department and also identified Gray as the Arby's robber in a six-picture photo array.

On February 26, 2007, the State charged Gray with Count I, class B felony robbery of Jones; Count II, class B felony criminal confinement of Doss; Count III, class B felony

robbery of Clark; Count IV, class B felony criminal confinement of Dodge; Count V, class B felony criminal confinement of Crowe; Count VI, class A misdemeanor possession of marijuana; and alleged that he was a habitual offender. Appellant's App. at 8-9.¹ On March 15, 2007, Gray, acting pro se, moved to sever Counts I and II from Counts III, IV, and V, and moved to suppress his statements to police during his arrest and book-in. *Id.* at 53, 62. On March 19, 2007, Gray moved to suppress the pretrial identifications of him as the robber involving the six-picture photo arrays and the one-on-one identifications immediately following the Long John Silver's robbery as improperly suggestive. *Id.* at 82. After a hearing, the trial court denied the motion to sever and the motion to suppress except to statements Gray made to police during his book-in.

At trial, Gray appeared pro se with standby counsel. He failed to contemporaneously object to the testimony regarding the pretrial identifications or the admission of the photo arrays. Tr. at 221-22, 289, 399-400, 438-49. He did not contemporaneously object to the in-court identifications of him as the robber by Henley, Doss, Jones, Dodge, Clark, and Crowe. *Id.* at 224, 274-75, 291, 403, 426, 439-440. He also did not contemporaneously object to the admission of his statements to Captain Hennessey. *Id.* at 322, 329-330. The jury found him guilty as charged on May 2, 2007. Gray then admitted to being a habitual offender. On May 30, 2007, the trial court sentenced Gray to an aggregate sentence of seventy years. Gray appeals.

¹ Counts I and II relate to the Long John Silver's robbery, and Counts III, IV, and V relate to the Arby's robbery.

Discussion and Decision

I. Motion For Severance

Indiana Code Section 35-34-1-9(a) provides that two or more offenses may be joined in the same indictment or information when the offenses are (1) of the same or similar character, even if not part of a single scheme or plan, or (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. However, where two or more offenses are joined for trial in the same indictment or information solely upon the ground that they are of the same or similar character, the defendant is entitled to severance as a matter of right. Ind. Code § 35-34-1-11; *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997).

Gray contends that he was entitled to the severance of the Arby's and Long John Silver's charges as a matter of right because they were joined for trial solely on the ground that they were of the same or similar character. We disagree.

Crimes will be considered part of a single scheme or plan for purposes of Indiana Code Section 35-34-1-9(a)(2) when there is evidence linking the crimes by a common modus operandi. *Ben-Yisrayl*, 690 N.E.2d at 1145 (quotation marks omitted). Modus operandi means literally "method of working" and refers to a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer. *Wilkerson v. State*, 728 N.E.2d 239, 246 (Ind. Ct. App. 2000). With respect to modus operandi, "the inquiry must be, 'Are these crimes so strikingly similar that one can say with reasonable certainty that one and the same person committed them?' Not only must the methodology of the two crimes be strikingly similar, but the method must be unique in ways

which attribute the crimes to one person.” *Penley v. State*, 506 N.E.2d 806, 810 (Ind. 1987) (discussing modus operandi in the admissibility context).

We think *Harvey v. State*, 719 N.E.2d 406 (Ind. Ct. App. 1999), is helpful. There, the trial court denied a motion to sever the offenses stemming from two robberies. The robberies took place four days apart at approximately the same time of day in the same part of Indianapolis between Ditch Road and Michigan Road on West 86th Street. The suspects in both cases were two black males, one very tall and the other fairly short. The larger suspect wielded a handgun in both crimes and physically manipulated the victims while the smaller suspect, Harvey, assisted. In both instances, the larger suspect pistol-whipped the victim after emptying the cash register. This Court noted that while some of these similarities are inherent in many robberies, the facts were sufficient to show a ““series of acts connected together”” induced by a common motive to rob. *Id.* at 409. Thus, the defendant was not entitled to severance as a matter of right. *Id.*

Here, the robberies took place at the same kind of business—a fast food restaurant—in the same town, at night, within four days of each other. The robber at each restaurant wore the same type of clothing—a toboggan hat and a black jacket—and was described as a white male with little facial hair and of average height and build. The robber kept his right hand in his right jacket pocket, which gave the impression that he was armed, and made statements that implied he was armed. Each time, the robber first asked for the manager and then gave the other employees instructions to keep them controlled and out of his way. The robber then ordered the manager to open the safe first, followed by the cash registers. The robber also

ordered the employees not to look at him. Gray's offenses were connected by time, geography, manner of dress, manner of commission, and motive. While there were some differences between the two robberies, the similarities, taken as a whole, are so distinctive that each could be recognized as the work of the same wrongdoer. Based on *Harvey*, the charges against Gray were joined because they were based on a series of acts connected together. Therefore, Gray was not entitled to severance as a matter of right. *See id.*; *see also Waldon v. State*, 829 N.E.2d 168, 174 (Ind. Ct. App. 2005) (holding severance not matter of right where burglaries were committed within a few days, juveniles would meet around 10:30 or 11:00 p.m., use screwdriver to pry doors open, and take money or other things if money not available), *trans. denied*.

If severance is not a matter of right, the trial court, upon motion of the defendant or the prosecutor, shall grant a severance whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Ind. Code § 35-34-1-11(a); *Ben-Yisrayl*, 690 N.E.2d at 1145. The trial court is to base this determination on (1) the number of offenses charged, (2) the complexity of the evidence to be offered, and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Ind. Code § 35-34-1-11(a); *Ben-Yisrayl*, 690 N.E.2d at 1145. We review a trial court's refusal to sever charges pursuant to Indiana Code Section 35-34-1-11(a) for an abuse of discretion. *Ben-Yisrayl*, 690 N.E.2d at 1146. We will reverse the judgment and order new, separate trials only if the defendant can “show that in light of what actually occurred at trial, the denial of a separate trial subjected him to such prejudice that the trial court abused its discretion in refusing to grant his motion

for severance.”” *Brown v. State*, 650 N.E.2d 304, 305 (Ind. 1995) (quoting *Hunt v. State*, 455 N.E.2d 307, 312 (Ind. 1983)).

Gray concedes that “he could not establish that the number of the offenses charged or the complexity of the evidence offered subjected him to any prejudice” or that the jury would be unable to distinguish the evidence and apply the law. Appellant’s Br. at 16. However, he suggests that the jury, in violation of the spirit of Indiana Evidence Rule 404(b),² was more likely to convict him of the Arby’s robbery based on his disposition to commit robberies after hearing the evidence presented to prove the commission of the Long John Silver’s robbery.

We observe that Gray has not argued that the evidence was insufficient to sustain his convictions relating to the Arby’s robbery, nor would such an argument prevail. Therefore, he cannot complain that he suffered any prejudice. *See Brown*, 650 N.E.2d at 305. We conclude that the trial court did not abuse its discretion in denying Gray’s motion for severance.

II. Admission of Statements to Police

Gray claims that the trial court erred in admitting his responses to Captain Hennessey’s questions as to where the money was and whether he wore the toboggan hat during the Long John Silver’s robbery because Gray had not been given *Miranda* warnings. Although Gray originally challenged the admission of these statements through a motion to suppress, he appeals following a completed jury trial and challenges the admission of

² Indiana Evidence Rule 404(b) provides, “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]”

statements at trial. “Thus, the issue is ... appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.” *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). “An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court.” *Id.*

The State argues that Gray waived this issue for appellate review because Gray failed to make a contemporaneous objection to the admission of these statements at trial. The failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. *Jackson v. State*, 735 N.E.2d 1146, 1152 (Ind. 2000). Gray contends that the issue is properly preserved because the trial court showed his motion to suppress statements renewed for the record and incorporated the evidentiary hearings held on the motion. At a conference prior to opening statements, the trial court noted that Gray renewed his motion to suppress statements and denied the motion except as to Gray’s statements during book-in. Tr. at 156. Gray did not object when the statements were offered into evidence. He therefore waived this issue. *See Jackson*, 735 N.E.2d at 1152; *see also Moore v. State*, 669 N.E.2d 733, 742 (Ind. 1996) (“To preserve a suppression claim a defendant must make a contemporaneous objection that is sufficiently specific to alert the trial judge fully of the legal issue. When a defendant fails to object to the introduction of evidence, makes only a general objection, or objects only on other grounds, the defendant waives the suppression claim.”) (citations omitted).

Waiver notwithstanding, any error resulting from the admission of the statements was harmless.

[S]tatements obtained in violation of *Miranda* and erroneously admitted are subject to harmless error analysis. The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. A federal constitutional error is reviewed de novo and must be “harmless beyond a reasonable doubt.” The court must find that the error did not contribute to the verdict, that is, that the error was unimportant in relation to everything else the jury considered on the issue in question.

Morales v. State, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001) (internal citations omitted).

Here, Gray’s convictions are supported by substantial independent evidence of guilt such that there was no substantial likelihood that the statements contributed to the convictions. Gray does not argue that the toboggan hat and bags of money, both in plain view of the officers in his car, were inadmissible. Henley, Doss, and Jones unequivocally identified Gray as the robber of Long John Silver’s immediately after the robbery. Gray has not challenged Doss’s pretrial identification, and, in the following section, we determine that that Henley’s and Jones’s pretrial identifications did not violate due process principles. Finally, we reject Gray’s purely speculative claim that the jury considered his statements in determining whether he committed the offenses relating to the Arby’s robbery. Accordingly, we conclude that any error in the admission of Gray’s statements was harmless beyond a reasonable doubt.

III. Admission of Identification Evidence

Gray next contends that the trial court erred in denying his motion to suppress identification evidence. As with the admission of his statements to police, we address this issue as “whether the trial court abused its discretion by admitting the evidence at trial.” *See Washington*, 784 N.E.2d at 587. Our standard of review of rulings on the admissibility of

evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. However, we must also consider the uncontested evidence favorable to the defendant. *Id.* In this sense, the standard of review differs from the typical sufficiency of the evidence case where only evidence favorable to the verdict is considered. *Fair v. State*, 627 N.E.2d 427, 434 (Ind. 1993).

The State argues that Gray waived the issue for appellate review. At trial, Gray did not contemporaneously object to testimony regarding the pretrial identifications of him as the robber made by Henley, Jones, Dodge or Crowe, and the trial court's recognition of Gray's renewal of his motion to suppress pretrial identifications prior to the presentation of evidence is inadequate to preserve this issue for review. This issue is waived. *See Jackson*, 735 N.E.2d at 1152.

Waiver notwithstanding, Gray's argument must fail. The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. *Harris v. State*, 716 N.E.2d 406, 410 (Ind. 1999). When analyzing the propriety of a pre-trial identification procedure, the first question we must resolve is whether, under the totality of the circumstances, the out-of-court procedure was conducted in a fashion that led the witness to make a mistaken identification. *Allen v. State*, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004). Our supreme court has held that a photo array is impermissibly suggestive only where the

array is accompanied by verbal communications or the photographs in the display include graphic characteristics that distinguish and emphasize the defendant's photograph in an unusually suggestive manner. *Bell v. State*, 622 N.E.2d 450, 455 (Ind. 1993), *overruled on other grounds by Jaramillo v. State*, 823 N.E.2d 1187 (Ind. 2005). A photographic array is sufficient, however, if the defendant "does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features." *Harris*, 716 N.E.2d at 410 (citation and quotation marks omitted).

If a pre-trial identification procedure was unduly suggestive, then testimony relating to it is inadmissible. *Williams v. State*, 774 N.E.2d 889, 890 (Ind. 2002). However, a witness who participates in an improper pre-trial identification procedure may still identify a defendant in court if the totality of the circumstances shows clearly and convincingly that the witness has an independent basis for the in-court identification. *Young v. State*, 700 N.E.2d 1143, 1146 (Ind. 1998).

Gray asserts that the photo arrays were impermissibly suggestive based on two combined factors: (1) Captain Abell first showed Crowe and Dodge a photograph of the toboggan hat and bank bags that were found in Gray's car, which suggested that police had caught the perpetrator; and (2) his picture was lighter than the pictures of the other five individuals included in the photo array. Ex. at 24, 25. First, while the evidence as to the order that the photos were shown to Dodge and Crowe was mixed, we consider conflicting evidence most favorable to the trial court's ruling. *See Collins*, 822 N.E.2d at 218. Captain Abell testified that he showed the witnesses the photo array first, as did Dodge. Tr. at 557, 729, 731. Further, while our review of the photo arrays confirms that Gray's photograph was

somewhat lighter than the others, we do not agree that this factor alone renders the arrays impermissibly suggestive where, as here, all the other photographs show males with strikingly *similar* characteristics. We observe that both Crowe and Doge were exceedingly sure of their out-of court and in-court identifications of Gray as the robber. Therefore, we conclude that the trial court did not abuse its discretion in admitting testimony regarding Dodge's and Crowe's pretrial identifications.³

Gray also asserts that the pretrial identifications made by Jones and Henley just after the Long John Silver's robbery were impermissibly suggestive. While one-on-one confrontations are inherently suggestive, such confrontations are not per se improper. *Gray v. State*, 563 N.E.2d 108, 110 (Ind. 1990). Factors to be considered in determining whether misidentification is the likely result of a one-on-one confrontation include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the length of initial observation of the criminal, (3) lighting conditions, (4) the distance between the witness and the criminal, (5) the witness's degree of attention, (6) the accuracy of the witness's prior description of the criminal, (7) the level of certainty demonstrated by the witness, and (8) any identifications of another person. *Mitchell v. State*, 690 N.E.2d 1200, 1204 (Ind. Ct. App. 1998) (citing *James v. State*, 613 N.E.2d 15, 27 (Ind. 1993), and *Craig v. State*, 515 N.E.2d 862, 864 (Ind. 1987)). Confrontations immediately after the crime are valuable because they allow witnesses to view the suspect while the image of the perpetrator

³ Even if this identification evidence were improperly admitted, we would find no reversible error because the evidence was cumulative of Clark's identification of Gray as the Arby's robber. See *Campbell v. Shelton*, 727 N.E.2d 495, 502 (Ind. Ct. App. 2000) ("Erroneously admitted evidence that is merely cumulative does not supply grounds for reversal.").

is fresh in the witness's mind. *Hill v. State*, 442 N.E.2d 1049, 1052 (Ind. 1982). In fact, "the immediacy of the incident substantially diminishes the potential for misidentification." *Id.*

In the case at bar, most of the evidence shows that Jones's identification of Gray was decidedly unlikely to result in a mistaken identification. Jones identified Gray as the Long John Silver's robber immediately after the offense occurred. Gray concedes that the police did not arrange the identification. Jones took it upon himself to exit the restaurant and identify Gray as the robber. Jones was in close proximity to the robber in good lighting while Jones opened the safe and the cash registers, which took a significant amount of time, and identified Gray with certainty. Therefore, we conclude that the testimony regarding Jones's pre-trial identification of Gray as the robber was not an abuse of discretion.

As to Henley, she was able to observe Gray without being observed herself. She viewed him while he told Doss that this was a robbery and to be calm and testified that she saw Gray for six to seven seconds. The lighting was good. Her identification also took place shortly after the offense, and she was confident of her identification. Finally, we are unpersuaded that any inconsistency in Henley's and the police officer's testimony as to the manner in which the police cars were situated renders Henley's identification of Gray less credible. We find no abuse of discretion here.

IV. Insufficient Evidence of Gun

Gray contends that the evidence was insufficient to establish that he had a gun at the Arby's and Long John Silver's, and therefore the enhancement of his convictions to class B felonies cannot stand. The standard of review of a sufficiency of the evidence claim is well established.

[W]e neither reweigh the evidence nor judge the credibility of the witnesses, as those matters are exclusively within the province of the jury. Instead, we consider the evidence most favorable to the verdict, along with all reasonable inferences to be drawn therefrom in order to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. If substantial evidence of probative value exists to support each element of the crime, we will not disturb the conviction.

Timberlake v. State, 690 N.E.2d 243, 251 (Ind. 1997) (citations omitted).

Gray does not argue that the evidence was insufficient to convict him of class C felony robbery and class D felony criminal confinement. Appellant's Br. at 32.⁴ Both robbery and criminal confinement may be elevated to class B felonies where the person was "armed with a deadly weapon." Ind. Code §§ 35-42-3-3(b)(2)(A), -5-1.⁵ Here, the State specifically alleged that the deadly weapon with which Gray was armed while committing the charged offenses was a gun.⁶ Appellant's App. at 8-9.

⁴ A person commits robbery when he "knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear." Ind. Code § 35-42-5-1. A person commits criminal confinement when he "knowingly or intentionally confines another person without the other person's consent[.]" Ind. Code § 35-42-3-3(a).

⁵ A deadly weapon is defined in pertinent part as follows:

(1) a loaded or unloaded firearm.
(2) a destructive device, weapon, devise, taser ... or electronic stun weapon ..., equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury.

Ind. Code § 35-41-1-8(a)(1)(2).

⁶ Gray contends that the prosecutor made comments that might have led the jury to believe that the electric shaver could serve as a deadly weapon. Appellant's Br. at 34-35. We think these brief comments are insignificant given that the trial court properly instructed the jury that it had to find that Gray was armed with a gun as an element of the class B felony offenses and modified the verdict forms, at Gray's request, to limit the term "deadly weapon" to a gun. Tr. at 928-35; Appellant's App. at 346-50.

Gray acknowledges that convictions for class B felony robbery and criminal confinement may be sustained even if a gun or deadly weapon was not revealed during the offense. Appellant's Br. at 30; *see Schumpert v. State*, 603 N.E.2d 1359, 1364 (Ind. Ct. App. 1992) (evidence was sufficient to support finding that defendant possessed handgun, even though alleged handgun was in sack and was not observed by any witnesses). However, he attempts to distinguish the present case from others in which the weapon was not actually seen by a witness but the evidence was sufficient to establish beyond a reasonable doubt that the defendant was armed with a deadly weapon. *See Lyda v. State*, 272 Ind. 15, 17-18, 395 N.E.2d 776, 778 (1979) (upholding trial court's denial of defendant's motion for directed verdict even though victims did not see a gun where defendant told victim he had a gun, acted like he was going to pull something from the pocket of his trousers, later engaged in gunfight with police, and police found gun near his body); *Schumpert*, 603 N.E.2d at 1364 (witness testified she felt gun when it was thrust into her back); *Buchanan v. State*, 490 N.E.2d 351, 354 (Ind. Ct. App. 1986) (finding sufficient basis for defendant's plea where defendant provided bank teller with a note that said, "Do as I say, I have a gun."); *Sewell v. State*, 442 N.E.2d 1142, 1143-44 (Ind. Ct. App. 1983) (finding sufficient evidence that defendant was armed with deadly weapon where defendant told victim he was armed and kept hand on hip behind his coat, which led victim to believe defendant had a weapon). We also observe that "it is not required that a gun or deadly weapon ever be introduced into evidence." *Buchanan*, 490 N.E.2d at 354.

As to the offenses that were committed at Arby's, Dodge testified that the robber had his hand in his pocket and "[she] figured it was a gun." Tr. at 398. She also testified that

she was in fear because she thought he had a weapon in his jacket. *Id.* at 562. Clark, the Arby's manager, testified that the robber had something in his right pocket, she saw a black handle that she assumed was a gun, it was pointed at her, and she was really scared for both her and her employees' lives. *Id.* at 419, 578. She further testified that the robber told her that if she stayed calm, no one would get hurt. *Id.* at 419. We conclude that this testimony constitutes substantive evidence of probative value from which a reasonable trier of fact could conclude beyond a reasonable doubt that Gray had a gun in his pocket.

Turning now to the offenses committed at the Long John Silver's, Henley testified that the robber had something in his pocket that was pointing and she thought it was a gun. *Id.* at 218, 233. Doss also testified that the robber had something in his pocket as he brought her to the back of the restaurant and that it looked like he had a gun. *Id.* at 268, 506-07. Jones testified that the robber kept his hand in his pocket like he was holding a gun and that the robber told Jones that he was acting like he wanted to die and could end up getting himself shot. *Id.* at 39-40, 282, 601-02. It was the jury's function to determine whether the aforementioned testimony was credible, and not that of this Court. *See Harvey v. State*, 542 N.E.2d 198, 200 (Ind. 1989) (noting that the function of jury is to assess credibility of witnesses). We therefore find that sufficient evidence exists to sustain Gray's convictions for class B felony robbery and class B felony criminal confinement.⁷

⁷ In his dissent, Judge Barnes states that during Gray's robbery of the Arby's restaurant, the witnesses simply assumed that he had a gun, with no corroborating evidence to support that assumption. Also, Judge Barnes states that "immediately following" the Long John Silver's robbery, the only item found in Gray's possession or in his car that could have been a weapon was an electric shaver. For these reasons, he concludes that there is insufficient evidence to support the "deadly weapon" element of Gray's convictions for class B felony robbery and criminal confinement.

In this case, the jury was clearly instructed that in order to find Gray guilty of these class B felonies, it

V. Double Jeopardy

Lastly, Gray urges us to find that his convictions for robbery and criminal confinement violate Indiana's constitutional double jeopardy provisions based on the actual evidence test enunciated in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53.

Here, Gray was charged with robbery of Long John Silver's employee Jones and Arby's employee Clark and criminal confinement of Long John Silver's employee Doss, Arby's employee Dodge, and Arby's employee Crowe. The prohibition against double jeopardy is not violated where each conviction involves a different victim. *See Bald v. State*, 766 N.E.2d 1170, 1172 (Ind. 2002) (upholding multiple convictions for felony and arson where there were separate victims); *Burnett v. State*, 736 N.E.2d 259, 263 n.3 (Ind. 2000) (holding that multiple confinement convictions do not violate double jeopardy where there are multiple victims), *overruled on other grounds by Ludy v. State*, 784 N.E.2d 459 (Ind.

had to conclude that at the time he committed the offenses, he was armed with a gun. Based on the evidence most favorable to the verdict (outlined in our opinion above), it was reasonable for the jury to infer that Gray had a gun in his possession during each robbery. No gun was ever recovered, but Gray was at large for four days following the Arby's robbery, and after the Long John Silver's robbery, he ran from the back of the restaurant to another business's parking lot, got into a car, and began to drive away. He certainly had opportunity to dispose of a gun during that time. The dissent appears to suggest the adoption of a bright line rule requiring that a gun be seen or recovered to support a conviction. Such a bright line rule has not heretofore been adopted by our supreme court. We disagree with the dissent regarding whether there was sufficient evidence of probative value to support the jury's determinations as to the "deadly weapon" element of each crime. In our view, the evidence was sufficient to support an inference that an actual gun was present on both occasions. Therefore, we must affirm the convictions. *See Timberlake*, 690 N.E.2d at 251.

2003); *Richardson*, 717 N.E.2d at 56 (“[W]here separate victims are involved or the behavior or harm that is the basis of the enhancement is distinct and separate, no relief will be provided.”); *Rawson v. State*, 865 N.E.2d 1049, 1055-56 (Ind. Ct. App. 2007) (upholding multiple convictions for criminal recklessness and attempted aggravated battery because each involved different victims), *trans. denied*; *Whaley v. State*, 842 N.E.2d 1, 15 (Ind. Ct. App. 2006) (upholding two convictions for resisting law enforcement even though a single incident of resisting occurred because two officers were injured), *trans denied*. Therefore, Gray’s convictions for robbery and criminal confinement do not violate Indiana’s prohibition against double jeopardy.⁸

Affirmed.

BRADFORD, J., concurs.

BARNES, J., concurs in part and dissents in part.

⁸ Gray cites *Vanzandt v. State*, 731 N.E.2d 450 (Ind. Ct. App. 2000), *trans denied*, to bolster his argument that he confined employees only long enough to complete the robbery. In *Vanzandt*, the defendant held two employees, Kite and Remington, at gunpoint while he robbed a pizza restaurant. He was charged with and convicted of robbery and criminal confinement of Kite and criminal confinement of Remington. The *Vanzandt* court found that the convictions for robbery and criminal confinement of Kite violated double jeopardy and vacated Vanzandt’s conviction for criminal confinement of Kite. *Id.* at 455-56. Here, the robbery and criminal confinement convictions each involve different victims, and therefore *Vanzandt* is inapplicable. Gray also cites *Williams v. State*, 395 N.E.2d 239 (Ind. 1979), which is also inapplicable; it involved four robbery convictions for the robbery of one business.

IN THE COURT OF APPEALS OF INDIANA

TONY R. GRAY,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 10A01-0708-CR-356
)	
)	
Appellee-Plaintiff.)	

BARNES, Judge, concurring in part and dissenting in part

I concur in part but respectfully dissent from affirming Gray’s convictions for robbery and criminal confinement as Class B felonies. It cannot be disputed that the State must prove every essential element of a charged crime beyond a reasonable doubt. It is my belief that the State failed in its proof here regarding the “deadly weapon” element of Class B felony robbery and criminal confinement.

The gist of the majority’s opinion seems to be that because Gray made threatening remarks to the Long John Silver’s victims about possibly getting shot and the handle of what could have been a weapon was seen in the Arby’s robbery, there was sufficient evidence that

he possessed a deadly weapon in both robberies. I disagree.

In all the cases cited by the majority and in my own research, sufficient evidence the defendant possessed a deadly weapon was established through direct evidence or circumstantial evidence corroborating a defendant's statement that he had a gun. For example, the defendant engaged in a gunfight with police immediately after a robbery, see Lyda v. State, 272 Ind. 15, 17-18, 395 N.E.2d 776, 778 (1979); the defendant told the victim he had a gun and she felt what she was certain was a gun pressed into her back, see Schumpert v. State, 603 N.E.2d 1359, 1364 (Ind. Ct. App. 1992); the defendant admitted to possessing a deadly weapon when pleading guilty, see Buchanan v. State, 490 N.E.2d 351, 354 (Ind. Ct. App. 1986); the defendant said he had a gun and a gun was found in the car he was driving just minutes after the robbery occurred, see Sewell v. State, 442 N.E.2d 1142, 1143-44 (Ind. Ct. App. 1982). There is no similar evidence in this case.

Rather, the majority seems to rely almost exclusively on the victims' belief or fear that Gray might have been armed. There has been a tendency in some cases to rely heavily on such belief or fear as evidence that a defendant was armed with a deadly weapon. I expressed my disagreement with that tendency in Davis v. State, 835 N.E.2d 1102, 1117-18 (Ind. Ct. App. 2005) (Barnes, J., concurring in result in part), trans. denied. The issue in that case was whether a BB gun could be a deadly weapon. I agreed with the majority that it could be, based upon its possible use as a bludgeon and evidence that such guns can cause serious injury. However, the majority went beyond this evidence and also relied upon evidence that the robbery victims thought the BB gun was a "real" gun and that that belief caused them substantial fear.

In rejecting reliance on such evidence, I stated:

Indiana Code Section 35-41-1-8 provides that a “deadly weapon” includes, besides firearms, devices or materials “that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury.” In my view, the plain language of this statute requires that a non-firearm item claimed to be a “deadly weapon” be actually capable of causing serious bodily injury, not that it appears capable of causing such injury to a victim or bystander. See Frey v. State, 580 N.E.2d 362, 364 (Ind. Ct. App. 1991), trans. denied (“Whether sufficient evidence exists to establish a weapon is deadly is determined by looking to whether the weapon had the actual ability to inflict serious injury under the fact situation and whether the defendant had the apparent ability to injure the victim seriously through use of the object during the crime.”) (emphasis added).

To the extent that the victims here were afraid of Davis and his accomplice, that is already a necessary element of the base offense of robbery as a Class C felony--taking another’s property by force, threatening force, or placing any person in fear. Ind. Code § 35-42-5-1.

If there had been no fear or threat of force in this case, there would have been no robbery. The key factor, I believe, that distinguishes using a “deadly weapon” to commit robbery and elevates it to a Class B felony is that there is an actual heightened risk of harm to the victim.

Davis, 835 N.E.2d at 1117-18 (Barnes, J., concurring in result in part) (footnote omitted). I also stated my belief that the majority’s position taken to its extreme “could lead a finger or a stick of butter to be found a ‘deadly weapon,’ if a robber were to point the finger or stick of butter from underneath a coat and was able to convince the victim that it was actually a gun.” Id. at 1117. The majority responded to this concern by stating that a victim’s fear or belief that a defendant was armed “are not the sole factors” used in deciding whether the defendant possessed a deadly weapon. Id. at 1113 n.5. Here, however, I believe that those are the sole factors used by the majority.

Indeed, although this case does not involve a finger or a stick of butter, here an electric shaver has been converted into a gun. That is the only item found in Gray's possession or in his car immediately following his commission of the Long John Silver's robbery that could have been what he was holding in his jacket pocket and using to threaten the victims. In other words, all of the evidence and all of the reasonable inferences therefrom lead to just one conclusion in my mind, namely that Gray used an electric shaver, not a gun, to rob the Long John Silver's. There is no claim or argument on appeal that an electric shaver could be a deadly weapon.

We do not know for sure that Gray used the same device to rob the Arby's, but on the other hand there is no evidence he used a gun; all we know is that he used something with a black handle. Gray did not even say he had a gun. The witnesses simply assumed that he did, with no corroborating evidence to support that assumption. This cannot be enough to support a finding beyond a reasonable doubt that Gray actually had a gun.

Although public policy surely does come into consideration when a robber announces he is armed, I do not believe the statutory definition of deadly weapon was designed to punish defendants because of what victims may have thought; the law, in my view, should punish because of what a perpetrator does. Would I require that a deadly weapon be seen during a crime before I would sustain a finding that the defendant possessed a deadly weapon? No. I would, however, require some evidence, direct or circumstantial, that proves beyond a reasonable doubt a defendant was armed with a deadly weapon as the statute requires. That does not seem to me to be too much to ask.

Because of the lack of proof that Gray committed these crimes while armed with a

deadly weapon, I vote to reduce his robbery convictions to Class C felonies and his confinement convictions to Class D felonies and that he be resentenced accordingly. I otherwise concur in the majority opinion.